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United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Comments by the United Nations High Commissioner for Refugees (UNHCR) on the draft Law Proposal aiming at establishing a Statelessness Determination Procedure in the Netherlands.

I. Introduction

1. UNHCR appreciates the opportunity to present its comments on the draft Law Proposal aiming at establishing a Stateless Determination Procedure (SDP) in the Netherlands, and reiterates its appreciation of having been involved in expert meetings held to prepare the proposal.
2. UNHCR provides these comments as the agency which has been mandated by the UN General Assembly to prevent and reduce statelessness around the world, as well as to protect the rights of stateless people. UN General Assembly resolutions 3274 (XXIV) and 31/36 designated UNHCR as the body to examine the cases of persons who claim the benefit of the 1961 Convention on the Reduction of Statelessness and to assist such persons in presenting their claims to the appropriate national authorities. In 1995, the UN General Assembly further entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons.¹ This mandate has continued to evolve as conclusions of UNHCR's Executive Committee² have been endorsed by the UN General Assembly³. Over time, UNHCR has developed a recognized expertise on statelessness issues.⁴

¹ UNGA resolution A/RES/50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI) – 1995, *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, at: <http://www.unhcr.org/refworld/docid/3ae68c443f.html>.

² UN High Commissioner for Refugees, *Conclusion on International Protection*, 05 October 2001, No. 90 (LII) - 2001, para. (q), at: <http://www.unhcr.org/refworld/docid/3bd3e3024.html>; *General Conclusion on International Protection*, 10 October 2003, No. 95 (LIV) - 2003, para. (y), at: <http://www.unhcr.org/refworld/docid/3f93aede7.html>; *General Conclusion on International Protection*, 08 October 2004, No. 99 (LV) - 2004, para. (aa), at: <http://www.unhcr.org/refworld/docid/41750ef74.html>; *General Conclusion on International Protection*, 07 October 2005, No. 102 (LVI) - 2005, para. (y), at: <http://www.unhcr.org/refworld/docid/43575ce3e.html>; *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, 06 October 2006, No. 106 (LVII) - 2006, paras. (f), (h), (i), (j) and (t), at: <http://www.unhcr.org/refworld/docid/453497302.html>.

³ UNGA resolution A/RES/61/137 of 19 December 2006.

⁴ In 2014, UNHCR published the Handbook on Protection of Stateless Persons with the intention to provide a valuable resource for both statelessness determination and the development and implementation of law and policies relating to the protection of stateless persons: UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 30 June 2014, available at: <http://www.refworld.org/docid/53b676aa4.html>



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3. UNHCR understands that the Government of the Netherlands is proposing the establishment of a SDP, to amend Article 6(1) of the Dutch Nationality Act, which concerns all children born stateless in the Netherlands and finally, to withdraw reservations to articles 8 and 26 of the 1954 Convention.
4. In line with its mandate responsibility to address statelessness and to assist the Government of the Netherlands in ensuring that its citizenship legislation is in compliance with the 1954 United Nations *Convention relating to the Status of Stateless Persons* (hereinafter – 1954 Convention) and the 1961 United Nations *Convention on the Reduction of Statelessness* (hereinafter – 1961 Convention) which the Netherlands ratified in 1962 and 1985 respectively, UNHCR offers its comments on the proposed legislation and its explanatory memorandum. These comments mainly endeavour to clarify UNHCR's views on certain issues of interest under its mandate. UNHCR would greatly appreciate the opportunity to continue a dialogue with the Government of the Netherlands and to submit further comments on this important legislation at later stages of the legislative process.

II. General remarks

UNHCR welcomes the Government of the Netherlands' decision to introduce an SDP, to address statelessness at birth and to withdraw reservations to the 1954 Convention. UNHCR acknowledges the fact that the proposal provides for the possibility for UNHCR to take part in any proceedings set up to determine statelessness.

➤ *The Statelessness Determination Procedure*

5. UNHCR notes that Article 2(1) of the proposal states that '*a person with a direct interest can request to be determined stateless*'. UNHCR interprets '*a person with a direct interest*' as meaning that individuals can apply for themselves and their family members. In addition, UNHCR believes that it is in any stateless person's direct interest to have his or her statelessness determined, regardless of that person's current legal status in the country. UNHCR therefore suggests that the Explanatory memorandum provides clarity on what constitutes '*direct interest*' in order to avoid any limitation for stateless persons to apply under the procedure.
6. UNHCR recommends that for the procedure to be fair, efficient and accessible, information on its existence should be dissemination through targeted campaigns and

counselling on the procedure. It could contain a safeguard permitting State authorities to initiate a procedure.⁵

7. UNHCR notes that Article 2(2) of the proposal refers to the Dutch translation of the **definition of a stateless person** under article 1 of the 1954 Convention. As indicated in the advisory report of the Advies Commissie Vreemdelingenzaken (Advisory Committee for Migration Affairs)⁶, the translation into Dutch language of the definition does not entirely correspond to the definition in the original versions in English, French and Spanish⁷, which are authoritative.⁸ The English version defines a stateless person as ‘a person who is not considered as a national by any State under *the operation of* its law’ (emphasis added) whereas the Dutch translation is as follows: ‘a person who is not considered as a national by any State under its legislation’ [‘krachtens diens wetgeving’]. The distinction between ‘under its legislation’ and ‘under the operation of its law’ is of crucial importance in determining whether someone is stateless. Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual’s case in practice and any review/appeal decisions that may have had an impact on the individual’s status. This is a mixed question of fact and law. Applying this approach of examining an individual’s position in practice may lead to a different conclusion than one derived from a purely legal analysis of the application of nationality laws of a country to an individual’s case.⁹ UNHCR therefore urges that the draft law refers to the correct definition of a stateless person.
8. UNHCR notes that it is proposed in **Article 6 that the current Dutch Nationality Act** will be amended in article 1(f) to include a provision that stipulates that a stateless person is a person determined stateless based on Article 4 of the legislative proposal. This amendment would replace the current definition of a stateless person that is incorporated in article 1(f) of the Dutch Nationality Act. UNHCR recommends that the

⁵ See UNHCR Handbook for Protection of Stateless Persons, paragraph 68.

⁶ ACVZ, *Geen land te bekennen, advies over de verdragsrechtelijke bescherming van staatlozen in Nederland*, Den Haag, December 2013, available at https://acvz.org/wp-content/uploads/2015/05/04-12-2013_GeenLandTeBekennen.pdf

⁷ See page 70 of the ACVZ report.

⁸ Article 42 of the Convention: ‘Done at New York [...] in a single copy, of which the English, French and Spanish texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-Member States referred to in article 35.’

⁹ See for the meaning of ‘not considered as a national ... under the operation of its law’, paragraph 22-56 of the UNHCR, *Handbook on Protection of Stateless Persons*, available at <http://www.refworld.org/docid/53b676aa4.html>



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definition of a stateless person in the Dutch Nationality Act remains a direct translation of the definition of Article 1 of the 1954 Convention.

9. The proposal suggests in Article 6 that stateless persons under the Dutch Nationality Act are those persons who have been determined as such under Article 4 of the proposal, which sets out that the Court gives a final decision in this matter which is binding for all State institutions. UNHCR would like to raise the situation where the available evidence is clear and a statelessness claim is **manifestly well-founded**. Currently, such a person can be considered or registered as stateless under other existing laws and procedures by their respective competent authorities.¹⁰ UNHCR underlines the declaratory character of the determination by the Court and foresees difficulties if persons who are currently considered or registered as stateless based on other provisions and procedures in Dutch laws will, as a consequence of proposed Article 6, no longer be considered stateless. UNHCR would like to suggest that competent authorities continue to register or consider such persons as stateless without going through the newly established SDP. This would avoid unnecessary procedures, delays and costs for all parties involved. Further guidance could be developed as to what is considered a manifestly well-founded statelessness claim and when a person should be referred to the statelessness determination procedure for a formal determination.
10. In a report published in 2011¹¹, UNHCR proposed that **applicants in an SDP** should be issued with an identity document during the procedure, so that they could meet the Dutch legal requirement of always being able to identify themselves. UNHCR also recommended that a temporary residence permit should be issued for the duration of the relevant procedure. This would facilitate the individual's close contact with his lawyer and the possibility to be heard by the Court.¹² In addition, it would avoid the applicant's arrest and detention for unlawful stay in the country.
11. UNHCR has noticed that despite expert¹³ opinion recommending granting lawful stay during the procedure, the proposal explicitly stipulates in Article 2(5) that lodging a request to be recognized as a stateless person will not entail that the individual concerned will be granted lawful stay in the Netherlands for the duration of the procedure. The

¹⁰ This is the case for example of the civil registry, the IND or Mayors.

¹¹ UNHCR, *Mapping Statelessness in the Netherlands*, November 2011, see recommendations 16 and 17, available at <http://www.refworld.org/docid/4eef65da2.html>

¹² UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 71.

¹³ Discussiestuk van de expertgroep over de inrichting van een vaststellings procedure voor staatloosheid, par. 5.3, <https://acvz.org/wp-content/uploads/2015/07/ADV-007-aanbieding-discussiestuk-staatloosheid.pdf>



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explanatory memorandum stipulates that the applicant can undergo the procedure while abroad. This implies that deportation of applicants in a SDP can take place. UNHCR fears that the expulsion of an applicant during the procedure might seriously hamper due process.¹⁴ UNHCR would like to reiterate that as the 1954 Convention rights are formulated almost identically to those in the 1951 Refugee Convention, it is recommended that individuals awaiting a determination of statelessness receive the same standards of treatment as asylum-seekers whose claims are being considered in the same State.¹⁵ This includes the right to lawfully stay in the country for the duration of the procedure. As confirmed by the drafting history of the 1954 Convention, applicants for statelessness status who enter into a determination procedure are therefore “lawfully in” the territory of a State party.¹⁶

10. Furthermore, UNHCR recommended in 2011 that recognition of statelessness should generally result in the issuance of a **residence permit**. Although the 1954 Convention does not require States to grant a person determined to be stateless a residence permit, granting such permission would fulfill the object and purpose of the Convention.¹⁷ UNHCR notes that currently all States with SDPs grant a right of residence to persons recognized as stateless, except in case the individual concerned poses a risk to national security or public order, or is admissible to another country.¹⁸ Possession of a residence permit would enable full enjoyment of the rights set out in the 1954 Convention.¹⁹ UNHCR is concerned that Article 4(3) of the proposal says that the person who has been determined to be stateless will not be granted a residence permit. The Explanatory Memorandum raised the concern that providing lawful stay following recognition as a stateless person might lead to abuse of the system and to receiving numerous requests. Based on experiences of other countries, UNHCR considers it unlikely that the establishment of an SDP and the subsequent grant of a right of residence will create a pull factor. France has had an SDP for the longest period and receives approximately 180 requests per year.²⁰ The UK received a total of 1,510 applications between April 2013 and December 2015. This figures mostly includes persons who were already on the territory of the UK at the time of the introduction of the SDP. On 27 May 2016, the Belgian Court

¹⁴ UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 72.

¹⁵ UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 145.

¹⁶ UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 135.

¹⁷ UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 147.

¹⁸ UNHCR, *Good Practices Paper, Action 6, Establishing Statelessness determination procedures to protect stateless persons*, p.8, available at: <http://www.refworld.org/docid/57836cff4.html>

¹⁹ See also UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 147-152.

²⁰ UNHCR, *Good Practices Paper, Action 6, Establishing Statelessness determination procedures to protect stateless persons*, p.3. For information about the statelessness determination procedure in France, see: <https://www.ofpra.gouv.fr/fr/apatridie/quelques-chiffres>



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of Cassation decided that Belgian authorities have to establish an SDP to enable stateless persons to apply for a residence permit.²¹ It reiterated the Constitutional Court judgment dated 11 January 2012 which stated that stateless persons have to be treated in a similar way as refugees when it comes to the entitlement to a residence permit, unless the State has been able to assess that the person can depart to a State that he or she has links with.²² The explanatory memorandum states that a person who is recognized as stateless but who does not have lawful stay in the Netherlands can receive a document that will identify him or her as stateless (page 20). UNHCR is concerned that even if such a document is issued, the stateless person will risk repeat arrest and detention if this identity document does not grant any form of lawful stay or residence in the country.

11. UNHCR notes that the explanatory memorandum refers to the need for the recognized stateless person to make it plausible that he or she, through no fault of his or her own, will not be allowed entry in the country of previous habitual residence or any other country. UNHCR would like to enquire how the fact that a person is determined to be stateless will be weighed in the 'no-fault procedure' where it is assessed whether a person can return to a country he or she supposedly has links with. UNHCR reiterates its position that the possibility of return to another country can be a ground for limiting protection of the stateless person in the territory only if protection is available in another country: when that person can (re)acquire a nationality through a simple, rapid and non-discretionary procedure or when the stateless person enjoys permanent residence status in a country of previous habitual residence to which immediate return is possible.²³
12. The proposal and the explanatory memorandum elaborate a number of **procedural safeguards** in the proposed SDP. The explanatory memorandum refers to a hearing by the Court rather than by the Immigration and Naturalization Service (IND) in principle, although it is not a compulsory hearing (section 4.2). The UNHCR Handbook calls for a right to an interview with a decision-making official and underlines that, in some cases, more than one interview with the applicant might be necessary.²⁴ UNHCR therefore

²¹ Kruispunt Migratie-Integratie, *Bodemrechter moet over verblijfsrecht van erkende staatlozen beslissen*, 25 August 2016, available at http://www.kruispuntmi.be/nieuws/bodemrechter-moet-over-verblijfsrecht-van-erkende-staatlozen-beslissen?utm_campaign=NB%20VRIPR%202016-07&utm_medium=email&utm_source=newsletter&utm_content=20602

²² Constitutional Court, *Arrest Nr 1/2012*, 11 January 2012, available at <http://www.const-court.be/public/n/2012/2012-001n.pdf>; See also UNHCR *Handbook on Protection of Stateless Persons*, paragraph 153-157.

²³ UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 153 – 157.

²⁴ UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 73 and 100.

recommends that the proposal and the explanatory memorandum include that the Court will, in principle, invite the applicant to a hearing.

13. UNHCR considers that, as also concluded during the preparatory expert meetings, the proposal should incorporate the applicant's right to an interview with the IND if the latter is to take on an advisory role to the Court in a statelessness determination procedure. This right should be explicitly recognized, even if the IND has already interviewed the applicant previously during an asylum procedure and if the Court has the possibility to hear the applicant as well.
14. UNHCR has concerns with respect to the limited possibility of **appeal** under the current proposal in article 3(4), which states that 'Upon the decision there is only appeal in cassation'. An effective right to appeal against a negative first instance decision on both fact and law would be an essential safeguard as it would ensure that an incorrect assessment of facts in first instance could be remedied.²⁵
15. In relation to **access to the procedure**, the explanatory memorandum refers to the Civil Procedure Act [Wetboek van Burgerlijke Rechtsvordering], which is applicable to the SDP. The memorandum stipulates on page 6 that the application needs to be accompanied by as much information and as much evidence as possible, otherwise the application will be considered as not well-founded. UNHCR would like to clarify if an application by a stateless person without documents will be considered by the Court and whether an application could be rejected on the sole basis of a lack of documentary evidence? For the procedure to be fair and efficient, access must be ensured.
16. In relation to the **burden of proof**, the explanatory memorandum states on page 7 that the most suitable party ['de meest gerede partij'] will have the responsibility to provide information in the procedure, as per the Civil Procedure Act. UNHCR reiterates that in SDPs the burden of proof should in principle be shared. Given the nature of statelessness, applicants are often unable to substantiate their claim with much, if any, documentary evidence.²⁶ Statelessness determination authorities need to take this into account. Both the applicant and examiner must cooperate to obtain proof²⁷, if necessary by reaching out to the competent authorities of the countries with which the applicant has links. This

²⁵ UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 76 and 77.

²⁶ UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 90.

²⁷ UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 89.

is particularly relevant as UNHCR has noted that in practice, some states only accept enquiries that come directly from another State.²⁸

17. As for the **standard of proof**, the explanatory memorandum states on page 6 that the Court needs to conclude that it is highly plausible [‘zeer aannemelijk’] that an applicant does not have a nationality. However, on page 10 and 11, the text refers to the Court determining whether it is sufficiently plausible [‘voldoende aannemelijk’] that the person is stateless. UNHCR is concerned that a higher standard of proof would undermine the object and purpose of the 1954 Convention, and of the procedure itself. As with the burden of proof, the standard of proof or threshold of evidence necessary to determine statelessness must take into consideration the difficulties inherent in proving statelessness, particularly in light of the consequences of incorrectly rejecting an application. A finding of statelessness would be warranted where it is established to a ‘reasonable degree’ that the applicant is stateless.²⁹ UNHCR recommends that where limited or no documentary evidence is presented, additional weight will be given to an applicant’s written or oral statement, country of origin information and any results of the enquiries with States.³⁰

18. UNHCR welcomes the possibility, as explained in the explanatory memorandum, for an applicant to receive free **legal aid**.

UNHCR recommends that:

- The definition of a stateless person in the proposal and in the Dutch Nationality Act correspond to the definition of the authoritative language versions of the 1954 Convention;
- The current process where a person can be considered or registered as stateless by other authorities under other laws and procedures is maintained for manifestly well-founded statelessness claims, where the available evidence is clear, without going through the newly established SDP.
- Applicants in the statelessness determination procedure are provided with an identity document if they do not possess one and are allowed lawful stay for the duration of the procedure;
- Persons determined to be stateless are generally issued with a residence permit, in a similar way as persons recognized as refugees;

²⁸ UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 97.

²⁹ UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 91 – 93.

³⁰ UNHCR, *Handbook on Protection of Stateless Persons*, paragraph 94.



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- Procedural safeguards include an interview, a possibility to appeal a first instance decision on fact and law, access to the procedure, a shared burden of proof, and a standard of proof of a reasonable degree of likelihood.

➤ ***Prevention of statelessness at birth***

19. UNHCR has recommended that Article 6(1)(b) DNA be amended so as to provide children born stateless in the Netherlands who are unlawfully staying in the Netherlands the right to opt for Dutch nationality.³¹ In that context, UNHCR underlined the need that the “lawful stay” requirement in the current Article be rescinded, as this prerequisite is not in conformity with the 1961 Convention. As the most effective way of preventing statelessness, UNHCR recommends that any child born in the Netherlands who would otherwise be stateless be granted Dutch nationality. If any residency requirement is nevertheless to be retained, UNHCR notes that a requirement of habitual residence would be in conformity with Art. 1(2) of the 1961 Convention.³²

20. The State Secretary of Security and Justice first came forward with a draft of an amendment of Article 6(1)(b) of the Dutch Aliens Act in 2014. This draft extended the right to Dutch nationality to children born stateless in the country without lawful residence but did not extend this right to children whose parents did not cooperate with the State’s authorities in expulsion proceedings. UNHCR reacted in January 2015³³ and argued that a requirement of cooperation in expulsion procedures from the parents cannot be set, as children are to be protected against discrimination or punishment on the basis of the status or activities of the child’s parents, as per article 2 of the Convention on the Rights of the Child. UNHCR also commented that the exhaustive nature of the list of requirements in the 1961 Convention meant that States could not establish conditions for the grant of nationality additional to those stipulated in the Convention. The Committee on the Rights of the Child made similar comments.³⁴ UNHCR in this context would like to refer to a judgment of the Dutch Supreme Court from 2012 concerning acts

³¹ UNHCR, *Mapping Statelessness in the Netherlands*, November 2011, p. 63.

³² UNHCR, *Mapping Statelessness in the Netherlands*, November 2011, p. 63.

³³ UN High Commissioner for Refugees (UNHCR), *UNHCR's legal observations regarding the Proposal to amend the Nationality Act - Conditions to grant stateless children born in the Netherlands the right to apply for Dutch nationality*, 30 January 2015, available at: <http://www.refworld.org/docid/5617c2c74.html>

³⁴ UN Committee on the Rights of the Child (CRC), *Concluding observations on the fourth periodic report of the Netherlands*, 8 June 2015, CRC/C/NDL/CO/4, at para. 33, available at: <http://www.refworld.org/docid/566fc5a04.html>.



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by parents in the Netherlands, more specifically the fact that the parent(s) had not cooperated in the deportation procedure. The Supreme Court³⁵ considered that: *'The State has the responsibility to safeguard the rights and interests of children, also in the case of minor children without a residence permit. These children cannot be held responsible for acts of their parents or their relatives.'*

21. UNHCR notes that the proposal refers under article 6(A)(f) to the definition of a stateless person that is not in line with the definition contained in article 1 of the 1954 Convention (See paragraph 7 of these comments).
22. The inclusion of the condition 'cannot acquire another nationality' is not allowed, strictly speaking, under the 1961 Convention. In situations where a child born stateless can acquire the nationality of one of the parents, UNHCR has put forward that *'[i]t is acceptable for Contracting States not to grant nationality to children in these circumstances only if the child concerned can acquire the nationality of a parent immediately after birth and the State of nationality of the parent does not have any discretion to refuse the grant of nationality. (...) Moreover, the State is to grant nationality if a child's parents are unable or have good reasons for not registering their child with the State of their own nationality. This needs to be determined depending on whether an individual could reasonably be expected to take action to acquire the nationality in the circumstances of their particular case'*.³⁶ UNHCR recommends that the current proposed condition be removed or interpreted as above.

UNHCR recommends that:

- The requirement that the condition of lawful stay be removed, or at the minimum, be replaced by a condition of habitual residence;
- Children are not penalized by the lack of cooperation with expulsion procedures by their parents;
- The requirement that children born stateless cannot acquire another nationality to be able to apply for Dutch citizenship should be either removed or limited to circumstances where the child concerned can acquire the nationality of a parent immediately after birth and the State of nationality of the parent does not have any discretion to refuse the grant of nationality.

³⁵ Hoge Raad 21 september 2012, LJN:BW5328, paragraph 3.7.2, available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2012:BW5328>.

³⁶ UN High Commissioner for Refugees (UNHCR), *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, available at: <http://www.refworld.org/docid/50d460c72.html>, paragraph 25-26.



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➤ ***Reservations to the 1954 Convention***

23. UNHCR welcomes the proposal to withdraw the reservations that the Netherlands had made with regard to Articles 8 and 26 to the 1954 Convention.

UNHCR, November 2016